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FISCAL IMPACT REPORT

ORIGINAL DATE 1/21/2008

SPONSOR Beffort LAST UPDATED _____ HB _____

SHORT TITLE Whistleblower Protection Act SB 132

ANALYST Moser

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$0.1	\$0.1	\$0.1	Recurring	General fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 State Personnel Office (SPO)
 Department of Corrections
 NM Department of Transportation (NMDOT)
 NM Municipal League
 NM Association of Counties

SUMMARY

Synopsis of Bill

The AGO notes that Senate Bill 132 reinstates those protections previously held by public employees under federal law, 42 USC Section 1983. In 2006, the US Supreme Court withdrew this protection by holding that public employees are not protected under Section 1983 when they take action "pursuant to their official duties" (*Garcetti v. Ceballos*, 126 S.Ct. 1951). Because of this decision public employees are not protected against retaliation for reporting government corruption. The AGO indicates that such protection will not be afforded employees unless a bill like SB132 is enacted.

Senate Bill 132 prohibits retaliation by public employers against public employees who take action or object to or refuse to participate in a matter regarding what is, or what they believe in good faith is, an “unlawful or improper act.”

“Public employer” is defined to include state agencies and commissions; political subdivisions of the state; and every office or officer of any of those entities.

A “retaliatory action” by a public employer or officer means the discharge, suspension, demotion or disciplining of, or threatening or taking any discriminatory or adverse employment action against a public employee in the terms and conditions of his or her employment.

Protected activities of the employee include disclosing or threatening to disclose, providing information or testifying regarding, or objecting or refusing to participate in an activity, policy or practice that is, or what the employee in good faith believes is an unlawful or improper act. An “unlawful or improper act” is defined as a practice, procedure, action or failure to act on the part of a public employer or officer that (1) violates or is a suspected violation of a federal law or regulation, state law or administrative rule, or a law of any political subdivision; (2) constitutes malfeasance in public office; or (3) is of a public concern or results or would result in a specific and substantial danger to public health and safety.

The bill provides that actions under the act may be brought in any court of competent jurisdiction within three years from the date of the alleged retaliation. Public employers or officers can raise affirmative defenses under the act, such as that disciplinary action was warranted due to misconduct, poor job performance or reductions in the workforce. The remedies provided in the act are not exclusive, and do not preclude civil or criminal actions against an employee who files a false claim under the act. The remedies within this bill are taken from the "Fraud Against Taxpayers Act", Section 44-9-11, NMSA 1978.

FISCAL IMPLICATIONS

While there is no direct appropriation contained within this bill, there exists a significant potential for fiscal impact. The AGO states if any government employer violates the Act, its Risk Management representative(s) will be required to defend the suit, with the possibility existing to pay a settlement/judgment. Possible remedies include:

- actual damages,
- reinstatement with the same seniority status that the employee would have had but for the violation,
- two times the amount of back pay with interest on the back pay
- compensation for any special damage sustained as a result of the violation.
- litigation costs and reasonable attorney fees of the employee.

The NMDOT indicates that Senate Bill 132 provides employees with a second, independent avenue of redress, and could require public employers or officers to defend their disciplinary actions, or charges of discrimination and retaliation, both administratively and in court under two separate processes. If this is the case, additional costs would be borne by the public employer.

Additionally, NMDOT indicates that damages available to employees would be expanded under the proposed act. A public employer or officer that violated the act would be liable to the

employee for all relief needed to make the employee “whole,” including actual damages, reinstatement of employment status, two times the amount of back pay plus interest, special damages, litigation costs and attorney fees. Depending upon the number of new lawsuits, this could have a significant impact upon the budgets of public entities, including the NMDOT.

The NM Association of Counties in its opposition to the bill states that “the penalties prescribed in the bill are extreme and, perhaps, unconstitutional. Under federal and current state law, punitive damages cannot be assessed against a public entity. Under this bill, a public employer not only pays actual damages but would be required to pay “two times the amount of back pay with interest on the back pay.”

SIGNIFICANT ISSUES

As noted the AGO notes that Senate Bill 132 reinstates protections previously held by public employees under federal law, 42 USC Section 1983. In 2006, the US Supreme Court withdrew this protection by holding that public employees are not protected under Section 1983 when they take action "pursuant to their official duties" (*Garcetti v. Ceballos*, 126 S.Ct. 1951). As a result, public employees are no longer protected against retaliation for reporting government corruption, and will not be so protected unless a bill like this is enacted.

Concern exists with public employers that such an anti-retaliation law may provide some public employees, who are who are being disciplined for poor performance or other job related issues, with an opportunity to “shield” this behavior behind a false claim. Agencies indicate that it may be very difficult for the employer to prove that employee’s refusal to perform some duty related to the employer’s policy or practice was based on the employee’s good faith belief that the policy or practice was illegal or improper. The fact that the law does not preclude the state agency from seeking civil damages or criminal sanctions against an employee who files a false claim may give state agencies some protection in this regard. However, many state agencies would probably be hesitant to file any “false claim” actions against one of its current employees, for fear that this would create more problems arising from the employee or that the employee would then file a new retaliation lawsuit based on the “false claim” action. Further, the state agencies would still have had to expend the time and resources responding to and defending against the employee’s false claims

The Association of Counties strongly opposes this bill and indicates that the bill will substantially penalize a public entity if the entity takes an adverse employment action against an employee who refuses to participate in an activity or discloses an activity of the public employer so long as the employee believes in good faith that the employer’s policy or action constitutes an unlawful or improper act. Claims under this act will be extremely difficult to defend; the burden gets shifted to the employer to show that the employee’s actions were not in good faith. This seems to reverse the customary legal burden on a plaintiff, and places the burden on the public employer defendant.

TECHNICAL ISSUES

The NMDOT offers the following technical concerns:

- “The definition of “unlawful or improper” is vague, particularly with respect to Section E (3), which provides: “Unlawful or improper act” means a practice, procedure, action or

failure to act on the part of a public employer that: ... (3) is of public concern or....” An “improper” failure to act on a matter of “public concern” is a very broad notion and provides very little guidance to public agencies or officers as to when such a failure would rise to the level of liability under this act.

- The definition of “good faith” is also vague. As written, this bill allows employees to bring a lawsuit and subject the state to litigation on the mere belief that the public employer or officer has done something “improper.”
- The proposed bill does not require minimal threshold evidence for an employee to bring such an action. And, because a lawsuit is authorized to proceed on this basis, the employee may make accusations that in another context would be defamatory but will be privileged if brought under this Act. Although Section 3(D) attempts to protect employers from false claims, the state must initiate a separate lawsuit and prove lack of “good faith” in order to prevail. This is a very high and costly burden for public employers and officers to overcome.”

ALTERNATIVES

The following are suggested amendments to Senate Bill 132:

- To reduce frivolous claims and lawsuits, amend SB 132 to provide that in the event the defendant public agency or officer prevails, or if the complaint is found to be frivolous or not in good faith, the public employer or officer may recover litigation costs and attorney fees. It should not require a separate lawsuit to be initiated for a public employer or officer to recover these costs.
- Amend SB 132 to exclude actions based upon alleged improper disciplinary actions, as there is currently an adequate remedy at law through the State Personnel Act and the appeals process from those administrative decisions.
- Amend SB132 to require at least some evidence of unlawful or improper conduct to constitute a “good faith” belief that such conduct has occurred. Requiring a good faith belief to be based upon only whatever facts may be available to the public employee is an undefined minimal threshold.

GM/bb